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13 NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

14 UNITED STATES DISTRICT COURT

15 SOUTHERN DISTRICT OF CALIFORNIA – SAN DIEGO

16 FIREMAN'S FUND INSURANCE
17 COMPANY,

18 Plaintiff,

19 v.

20 NATIONWIDE MUTUAL FIRE
21 INSURANCE COMPANY, and DOES 1
22 through 25, inclusive,

23 Defendants.

24 NATIONWIDE MUTUAL FIRE
25 INSURANCE COMPANY,

26 Cross-Complainant,

27 v.

28 FIREMAN'S FUND INSURANCE
COMPANY and DOES 1 through 100,
inclusive,

Cross-Defendants.

No. **'11CV0114 IEG POR**

**NOTICE OF REMOVAL [28 U.S.C. §§
1332; 1441(b)]**

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO PLAINTIFF AND
ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that Defendant and Cross-Complainant NATIONWIDE
MUTUAL FIRE INSURANCE COMPANY ("NATIONWIDE") hereby removes the above-

1 entitled action from the Superior Court of the State of California for the County of San Diego,
2 Case No. 37-2009-00084537-CU-PL-CTL, to the United States District Court, Southern District
3 of California, pursuant to 28 U.S.C. §§ 1332, 1441(b), and 1446.

4 1. On December 16, 2010, an action was commenced in the Superior Court of the
5 State of California in and for the County of San Diego, entitled *Fireman's Fund Insurance*
6 *Company v. Nationwide Mutual Fire Insurance Company*, San Diego Superior Court Case No.
7 37-2010-00106232-CU-IC-CTL. This is an inter-insurer action asserting causes of action for
8 declaratory relief and equitable contribution. A copy of the Complaint is attached hereto as
9 **Exhibit A.**

10 2. The first date upon which NATIONWIDE received a copy of the said Complaint
11 was December 22, 2010, when NATIONWIDE was served with a copy of said Complaint from
12 the San Diego County Superior Court. A copy of the Proof of Service of Summons is attached
13 hereto as **Exhibit B.**

14 3. On January 20, 2011, NATIONWIDE served and filed its Answer and Cross-
15 Complaint in response to the *Fireman's Fund Insurance Company* action in the San Diego
16 Superior Court. A copy of the filed Answer and Cross-Complaint are attached hereto as
17 **Exhibits C and D**, respectively.

18 **REMOVAL JURISDICTION**

19 4. This is a civil action of which this Court has original jurisdiction under 28 U.S.C.
20 § 1332 in that it is a civil action between citizens of different states and the matter in controversy
21 exceeds the sum of \$75,000, exclusive of interest and costs. Therefore, this action may be
22 removed to this Court by defendant pursuant to the provisions of 28 U.S.C. § 1441(b).

23 **Diversity of Citizenship**

24 5. NATIONWIDE is now, and was at the time the state court action was filed,
25 incorporated in the State of Ohio, with its principal place of business in the State of Ohio. (See
26 Declaration of David H. Waters In Support of Notice of Removal ("Waters Decl.") ¶ 3.)

27 6. Plaintiff and Cross-Defendant FIREMAN'S FUND INSURANCE COMPANY
28 ("FIREMAN'S FUND") is now, and was at the time the state court action was filed, an

1 insurance company organized and existing under the laws of the State of California, with a
2 principal place of business in the State of California. (See Waters Decl. ¶ 4.)

3 **Amount in Controversy**

4 7. This civil action is being removed to federal court on the basis that this is a civil
5 action between citizens of different states and the matter in controversy exceeds the sum of
6 \$75,000. (See Waters Decl., ¶¶ 3-4, 8.)

7 8. FIREMAN'S FUND's Complaint seeks declaratory relief and equitable
8 contribution from NATIONWIDE for costs of suit and all sums paid by FIREMAN'S FUND to
9 defend FIREMAN'S FUND's insured, Rubio's Restaurants, Inc. dba: Rubio's Baja Grill
10 ("Rubio's"), in the underlying lawsuit, *Sayre, et al. v. Rubio's Restaurants, Inc.*, Superior Court
11 for the County of San Diego, Case No. 37-2009-00084537-CU-PL-CTL ("Sayre Action").
12 FIREMAN'S FUND's Complaint also alleges that NATIONWIDE may have an obligation to
13 indemnify Rubio's, and, therefore, FIREMAN'S FUND is reserving all rights with respect to
14 indemnity issues. (See **Exhibit A.**)

15 9. Plaintiff Timothy Sayre, the plaintiff in the Sayre Action, claims that as a result
16 of eating food at Rubio's, he suffered food poisoning. He claims that as a result of being
17 exposed to a toxin, he has numbness over his entire body, has lost reflexes, and has no sensory
18 feedback. He claims that he cannot use his hands, which are stiff and do not have much feeling.
19 He claims that he cannot walk due to Ataxia and Sensorial Peripheral Polyneuropathy. Because
20 he has no sensory feedback from his legs, he cannot control them enough to walk. His hands do
21 not give him any feedback so he cannot push his wheelchair with his hands. He cannot eat very
22 well. He cannot feel the food in his mouth so the eating process is both tiring and frustrating.
23 Finally, he claims that he been immobilized for such a long time that his muscles have atrophy.
24 Mr. Sayre claims damages against Rubio's of over \$600,000 in medical bills, and \$54,461.52 in
25 lost wages as of May 1, 2009. (See Waters Decl., ¶ 8.)

26 10. Mr. Sayre has made a global settlement demand to settle all of his claims in his
27 complaint in the sum of \$7,500,000. (See Waters Decl., ¶9.)

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TIMELINESS OF REMOVAL

11. The Complaint was filed on December 16, 2010. (See **Exhibit A**.)
NATIONWIDE was served with the Complaint on December 22, 2010. (See **Exhibit B**.) As
NATIONWIDE filed this Notice of Removal within thirty (30) days from the date of service, on
which date NATIONWIDE first received notice that the civil action was removable, this
removal is timely.

VENUE

12. The United States District Court for the Southern District of California is a proper
venue in that the action being removed was filed in the Superior Court of the State of California,
County of San Diego.

13. Attached hereto and marked as **Exhibit A** is a true and correct copy of
FIREMAN'S FUND's Complaint and the documents served with it (Civil Case Cover Sheet,
Summons, Notice of Case Assignment, Notice to Litigants/ADR Information Package and
(unsigned) Stipulation to ADR).

14. Attached hereto and marked as **Exhibit B** is a true and correct copy of
FIREMAN'S FUND's Notice of Proof of Service of Summons and Complaint on
NATIONWIDE.

15. Attached hereto and marked as **Exhibit C** is a true and correct copy of
NATIONWIDE's Answer to FIREMAN'S FUND's Complaint.

16. Attached hereto and marked as **Exhibit D** is a true and correct copy of
NATIONWIDE's Cross-Complaint against FIREMAN'S FUND and ROES 1 through 100,
inclusive.

17. Attached hereto and marked as **Exhibit E** is a true and correct copy of
NATIONWIDE's Motion for Preemptory Disqualification.

18. **Exhibits A, B, C, D and E** represent all processes, pleadings, orders, and records
filed in this action in the Superior Court of the State of California, County of San Diego, which
have been served upon NATIONWIDE.

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1 19. A Notice of Filing of this Notice of Removal is being filed in the Superior Court
2 of the State of California, County of San Diego, and is concurrently being served on
3 FIREMAN'S FUND.
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5 DATED: January 20, 2011

BURNHAM BROWN

6
7 By


DAVID H. WATERS

8 Attorneys for Defendant and Cross-Complainant
9 NATIONWIDE MUTUAL FIRE INSURANCE
10 COMPANY
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